



NATIONAL LABOR RELATIONS BOARD

29 CFR Part 102

RIN 3142-AA12

Representation Case Procedures

AGENCY: National Labor Relations Board

ACTION: Final rule; stay.

SUMMARY: The National Labor Relations Board (Board) is staying two provisions of its 2019 final rule (“Final Rule”) amending its representation case procedures to account for new court decisions. The two provisions, which have never been in effect, are stayed until September 10, 2023. This stay is necessary to accommodate pending litigation over remaining challenges to the Final Rule and because the Board is currently considering whether to revise or repeal the Final Rule, including potential revisions to the two provisions.

DATES: As of March 10, 2023, the amendments to 29 CFR 102.64(a) and 29 CFR 102.67(b) in the final rule that published at 84 FR 69524, on December 18, 2019, and delayed at 85 FR 17500, March 30, 2020, are stayed from May 31, 2020, until September 10, 2023.

FOR FURTHER INFORMATION CONTACT: Roxanne L. Rothschild, Executive Secretary, National Labor Relations Board, 1015 Half St., SE, Washington, DC 20570-0001, (202) 273-2940 (this is not a toll-free number), 1-866-315-6572 (TTY/TDD).

SUPPLEMENTARY INFORMATION: On December 18, 2019, the National Labor Relations Board published a final rule amending various aspects of its representation-case procedures. (84 FR 69524, Dec. 18, 2019.) The Board published the Final Rule as “a procedural rule which is exempt from notice and public comment, pursuant to 5 U.S.C. 553(b)(3)(A), as a rule of ‘agency organization, procedure, or practice.’” 84 FR at 69587. On March 30, 2020, the Board delayed the effective date of the final rule to May 31, 2020, upon request of the United States District

Court for the District of Columbia and to “facilitate the resolution of the legal challenges that have been filed with respect to the rule.” (85 FR 17500, Mar. 30, 2020.)

On May 30, 2020, the United States District Court for the District of Columbia issued an order in *AFL-CIO v. NLRB*, Civ. No. 20-cv-0675, vacating five provisions of the Final Rule and enjoining their implementation. 466 F. Supp. 3d 68 (D.D.C. 2020). The District Court concluded that each of the five provisions was substantive in nature, not procedural, and that the Board therefore violated the Administrative Procedure Act by failing to use notice and comment rulemaking. *Id.* at 92.

On January 17, 2023, the United States Court of Appeals for the District of Columbia Circuit issued a decision and order reversing the District Court as to two of the five provisions, agreeing with the Board that those provisions were procedural in nature and not subject to notice and comment rulemaking. *AFL-CIO v. NLRB*, 57 F.4th 1023, (D.C. Cir., 2023). The two provisions are: (1) an amendment to 29 CFR 102.64(a) allowing the parties to litigate disputes over unit scope and voter eligibility prior to the election;¹ and (2) an amendment to 29 CFR 102.67(b) instructing Regional Directors not to schedule elections before the 20th business day after the date of the direction of election.² The D.C. Circuit remanded the case to the District Court to consider two counts in the complaint that challenge these two provisions and that remain viable in light of its decision.

Due to the District Court’s injunction, these two provisions have never taken effect. The time for filing a petition for rehearing with the D.C. Circuit under Federal Rule of Appellate Procedure 40 has passed, and, once the District of Columbia Circuit’s mandate issues on or about March 10, 2023, the District Court’s injunction will be lifted. At that point, the two previously enjoined provisions will go into effect pursuant to the original May 31, 2020 effective date. The

¹ 84 FR at 69,593.

² 84 FR at 69,595.

District Court will also begin its consideration of the challenges to the two provisions remaining for decision.

The Board has decided to stay the effective date of the two provisions to September 10, 2023, six months from the expected issuance of the District of Columbia Circuit's mandate. The Board has determined that staying those provisions until September 10, 2023 would accommodate the pending legal challenges before the District Court. 5 U.S.C. 705. Moreover, a stay is necessary and appropriate because the Board is currently considering whether to revise or repeal the Final Rule, including potential revisions to these two provisions. Delayed implementation of these provisions will permit further consideration by the Board of the merits of the Final Rule and will avoid the possible waste of administrative resources and public uncertainty if the provisions were to go into effect only for a short period of time before being impacted by forthcoming revisions. The stay of the two provisions' effective date merely extends the status quo.

We disagree with the dissenting position of Member Kaplan, who argues a stay in the effective date of the two provisions is unwarranted. His position is based on his view of the policy merits of the provisions and the legal merits of the pending challenge to them in the District Court. At this juncture, however, consideration of the provisions' merits by the Board is premature. Resolution of the legal challenge to the provisions, in turn, is a matter for the District Court. As explained, a stay of the effective date of the provisions facilitates both processes, by preserving the status quo.

This stay is published as a final rule. The Board considers this rule to be a procedural rule that is exempt from notice and public comment, pursuant to 5 U.S.C. 553(b)(3)(A), because it concerns a rule of "agency organization, procedure, or practice." *AFL-CIO v. NLRB*, 57 F.4th at 1035.

Dissenting opinion of Member Kaplan:

In 2019, the Board issued a final rule¹ amending certain provisions of its representation-case rules, which had been extensively modified in a final rule enacted in 2014.² It did so without first issuing a notice of proposed rulemaking because it viewed the amendments as pertaining to “rules of agency . . . procedure,” and such “procedural rules” are exempt from notice-and-comment requirements under 5 U.S.C. 553(b)(3)(A). The AFL-CIO challenged the 2019 Rule in the United States District Court for the District of Columbia on several grounds, including that five provisions of the 2019 Rule were not procedural and therefore not exempt from notice-and-comment rulemaking. The district court agreed with the AFL-CIO and vacated all five.³ Recently, a divided Court of Appeals for the District of Columbia Circuit (“D.C. Circuit” or “court of appeals”) reversed in part, holding that two of the five are procedural but three are not.⁴ “Those three provisions,” said the court, “must remain vacated unless and until the Board repromulgates them with notice and comment.”⁵ In dissent, Judge Rao said that the majority had applied an “obsolete legal standard” and that “[u]nder the correct standard,” all five “are classic procedural rules.”⁶

In a separate final rule issued today, my colleagues rescind the three provisions of the 2019 Rule that the D.C. Circuit held to be not procedural. As I explain in my dissent to that rule, I would have asked the Solicitor General to file a petition for certiorari from the D.C. Circuit’s decision because the controlling legal test for determining when rulemaking is procedural and therefore exempt from notice-and-comment requirements under the Administrative Procedure Act presents “an important question of federal law that has not been, but should be, settled by” the Supreme Court.⁷ But since my colleagues did not join me in that regard, I would pursue the option the D.C. Circuit suggested and repromulgate the three provisions the court held not

¹ “Representation-Case Procedures,” 84 FR 69524 (Dec. 18, 2019) (the “2019 Rule”).

² “Representation-Case Procedures,” 79 FR 74307 (Dec. 15, 2014) (the “2014 Rule”).

³ *AFL-CIO v. NLRB*, 466 F. Supp. 3d 68 (D.D.C. 2020).

⁴ *AFL-CIO v. NLRB*, 57 F.4th 1023, 1034-1046 (D.C. Cir. 2023).

⁵ *Id.* at 1049.

⁶ *Id.* at 1050 (Rao, J., concurring in the judgment in part and dissenting in part).

⁷ Supreme Court Rule 10(c).

procedural for notice-and-comment rulemaking.⁸ I would do so because I believe, subject to comments, that those three provisions are superior to the rules that my colleagues have snapped back into place.

In the instant final rule, the majority addresses the two provisions of the 2019 Rule that the D.C. Circuit held to be procedural and therefore properly implemented without notice and comment. The AFL-CIO's challenge to those two provisions was not limited to its claim that they are not procedural, but the district court, having vacated them (erroneously) as not procedural, did not address the AFL-CIO's remaining contentions. Accordingly, the D.C. Circuit remanded the two provisions to the district court to address those contentions. Meanwhile, because the D.C. Circuit has held that those two provisions *are* procedural and therefore were properly enacted without notice and comment, they will take effect when the court of appeals issues its mandate. To prevent that from happening, my colleagues issue this rule to stay the effective date of the two provisions to September 10, 2023.

I disagree with their decision to do so. My colleagues state two reasons for issuing this stay: to give the district court time to consider the AFL-CIO's remaining arguments on remand, and to give themselves time to decide whether to revise or repeal the 2019 Rule, including the two provisions that have been sent back to the district court. I will not take this occasion to mount a comprehensive defense of the 2019 Rule. There is not time for me to do so; the court of appeals will issue its mandate on March 10, and my colleagues are determined to issue this rule before that happens. I will, however, explain why the two provisions of the 2019 Rule at issue here should be allowed to take effect when the court issues its mandate.

⁸ The D.C. Circuit also vacated a fourth provision of the 2019 Rule, which mandated impoundment of ballots if a request for review of a regional director's decision and direction of election is filed within 10 days of issuance of the decision and direction, and the Board has either granted or not ruled on the request for review before the conclusion of the election. The court held this provision unlawful as contrary to Sec. 3(b) of the Act. Interpreting Sec. 3(b) differently than the majority, Judge Rao would have upheld this provision as well. Although I agree with Judge Rao's interpretation, I recognize that repromulgating the ballot-impoundment provision for notice and comment is not an option.

The two provisions are these: (1) a rule providing that unit scope and voter eligibility (including supervisory status) normally will be litigated and resolved by the regional director before he or she directs the election (the “unit-scope-and-eligibility rule”), and (2) a rule providing that normally, the regional director will not schedule an election before the 20th business day after the date of the direction of election (the “20-days rule”). As the Board said in the 2019 Rule, these two provisions go hand in hand: the regional director will resolve disputes over unit scope and voter eligibility before directing the election, and the 20-days rule will give the Board time to act on a request for review of the regional director’s decision if one is filed. They should be allowed to take effect when mandate issues for two reasons. They promote important interests that the 2014 Rule subordinated to speed. And there is no good reason to wait for the district court to rule on the AFL-CIO’s remaining arguments for vacating these provisions because those arguments are meritless.

The rules at issue promote important interests.

Under the 2014 Rule, regional directors were instructed to schedule elections on “the earliest date practicable,” and litigation of disputes over unit scope and voter eligibility, including supervisory status, were largely postponed until after the election. Speed—i.e., shortening the time between the filing of the representation petition and the election—was prioritized over other interests. In the 2019 Rule, the Board acknowledged that speed is an important interest and that some of the changes it was making to the Board’s representation-case procedures would unavoidably result in some delay between the filing of the petition and the election. But the Board made clear that none of the changes had a *purpose* of delay but were being made to serve other important interests.

Specifically as to the provisions of the 2019 Rule at issue here, I cannot improve on the concise explanation the Board furnished there of the interests those rules serve. The italics are mine.

By permitting the parties—where they cannot otherwise agree on resolving or deferring such matters—to litigate issues of unit scope and employee eligibility at

the pre-election hearing, by expecting the Regional Director to resolve these issues before proceeding to an election, and by providing time for the Board to entertain a timely-filed request for review of the regional director's resolution prior to the election, the final rule promotes *fair and accurate voting* by ensuring that the employees, at the time they cast their votes, know the contours of the unit in which they are voting. Further, by permitting litigation of these issues prior to the election, instead of deferring them until after the election, the final rule removes the pendency of such issues as a barrier to reaching *certainty and finality of election results*. Under the 2014 amendments, such issues could linger on after the election for weeks, months, or even years before being resolved. This state of affairs plainly *did not promote certainty and finality*.

Relaxing the timelines instituted by the 2014 amendments also promotes *transparency* Providing employees with more detailed knowledge of the contours of the voting unit, as well as resolving eligibility issues, self-evidently promotes transparency; leaving issues of unit scope and employee eligibility unresolved until after an election (absent agreement of the parties to do so) clearly does a disservice to transparency. Relatedly, resolving issues such as supervisory status before the election ensures that the parties know who speaks for management and whose actions during the election campaign could give rise to allegations of objectionable conduct or unfair labor practice charges.

84 FR at 69529. I agree that the unit-scope-and-eligibility rule and the 20-days rule serve these important interests, and I believe these interests outweigh the interest in speed. Since I can think of no other reason my colleagues might have for repealing these rules than once again promoting speed at the expense of certainty, finality, and transparency, I would not delay their effective date to provide time to consider taking that step.

The AFL-CIO's remaining arguments are meritless.

The other reason the majority gives for staying of the unit-scope-and-eligibility rule and the 20-days rule is to provide time for the district court to rule on remand concerning the AFL-CIO's remaining grounds of attack on those rules. The AFL-CIO contends that both provisions must be vacated as arbitrary and capricious, and that the 20-days rule must additionally be vacated as contrary to Section 3(b) of the Act. There is no good reason to wait for the district court to dispose of these contentions because they will not succeed.

Regarding the AFL-CIO's arbitrary-and-capricious attack, one need look no further than the D.C. Circuit's decision to see that it will fail. The AFL-CIO had also argued before the

district court that the 2019 Rule as a whole was arbitrary and capricious. Affirming the district court's dismissal of that argument, the court of appeals wrote as follows:

The Board gives a rational account of how the 2019 Rule advances interests apart from speed. For example, the Board adequately explains that the election-scheduling provision—which supplements the “earliest date practicable” language with a default minimum period of twenty business days—promotes transparency and uniformity by making the timing of elections more predictable for parties. *See* [84 FR] at 69,546. It also explains that the provision regarding pre-election litigation of voter eligibility, unit scope, and supervisory status could provide employee-voters with more complete information about “who they are voting to join in collective bargaining.” *Id.* at 69,541.⁹

In other words, in explaining why the district court correctly rejected the AFL-CIO's contention that the 2019 Rule as a whole was arbitrary and capricious, the D.C. Circuit singled out the very provisions that are now back before the district court to determine whether they are arbitrary and capricious. The court of appeals could not have sent a clearer signal to the lower court that any other resolution besides dismissal is out of the question.

The AFL-CIO's claim that the 20-days rule is also unlawful as contrary to Section 3(b) of the Act also fails. Section 3(b) relevantly provides:

[U]pon the filing of a request therefor with the Board by any interested person, the Board may review any action of a regional director delegated to him under this paragraph, but such a review shall not, unless specifically ordered by the Board, operate as a stay of any action taken by the regional director.

29 U.S.C. 159(b). The clear language of this provision indicates that it is triggered only “upon the filing of a request [for review of a regional director's action] . . . with the Board.” Even assuming that the 20-days rule “operate[s] as a stay” of an action taken by the regional director--namely, tallying the ballots--this alleged “stay” is not triggered by the filing of any request for review with the Board. Rather, it results from the 20-days rule itself. Section 3(b) does not speak to that delay.¹⁰

⁹ *AFL-CIO v. NLRB*, 57 F.4th at 1047.

¹⁰ As stated above, the court of appeals found that the ballot-impoundment provision in the 2019 Rule is contrary to Sec. 3(b). That provision, however, is expressly triggered only when a party *files a request for review* within ten business days of the issuance of the direction of election and when certain other conditions are met.

In sum, my colleagues have failed to provide a persuasive reason for staying the effective date of the unit-scope-and-eligibility and 20-days rules. I favor allowing these rules to take effect just as soon as the D.C. Circuit issues mandate. Accordingly, from the majority's final rule, I dissent.

Dated: March 6, 2023.

Roxanne L. Rothschild,

Executive Secretary

[FR Doc. 2023-04839 Filed: 3/9/2023 8:45 am; Publication Date: 3/10/2023]